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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

SUPREME GRAND LODGE, MODERN FREE AND ACCEPTED COLORED MASONS OF THE WORLD,

Petitioner,

versus

MOST WORSHIPFUL PRINCE HALL GRAND LODGE, FREE AND ACCEPTED MASONS, JURISDICTION OF GEORGIA,

Respondent.

No. _____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING ARGUMENT.

Petitioner prays that a writ of certiorari issue to review the judgment of The United States Court of Appeals for the Fifth Circuit, entered in the captioned case on January 6, 1954.

OPINIONS BELOW

The findings, conclusions and judgment of the District Court (R. 1170-1185) are reported in 105 F. Supp. 315. The opinion of the Circuit Court of Appeals (R. 1226-1229) is unreported. The dissenting opinion of Hutcheson, Chief Judge, (R. 1229-1231) is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 6, 1954, (R. 1231-1232). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

STATUTES INVOLVED

The pertinent statutory provisions appear in Appendix A hereof, infra, pages 19-23.

STATEMENT

This action, instituted by Respondent against Petitioner in the District Court (Middle Dist., Georgia), was for injunction against the use of the words "Free and Accepted Masons" as part of the corporate name of Petitioner, and against the use by Petitioner of the masonic signs, emblems, etc., of Respondent. (See Complaint, R. 2-9; Amendment, R. 10-12).

Respondent was incorporated in Georgia in 1890 as a negro masonic order. (R. 1175). Petitioner was incorporated in Alabama in 1921 as a negro masonic order. (R. 1164-1166).

The original Complaint was brought on the charge that the acts of Petitioner were done "so as to deceive and confuse the public concerning the identities of the respective organizations." (Complaint, paragraph 15, R. 7). The Complaint as amended charged that the acts of Petitioner were done "so as to have a tendency to deceive and confuse . . . "(Amended Complaint, paragraph 2, R. 11). While for pleading the change may not be important, it becomes important because Georgia law requires proof (and pleading) that the acts of unfair competition must be committed "with intention of deceiving and misleading the public." (See Georgia Code, Sec. 37-712, Appendix A hereof, page 19).

Despite the facts that the evidence, without dispute, showed the following history of the corporate names of Petitioner and Respondent, giving to each their designation in the trial court:

Dates	Plaintiff (Respondent here) Georgia Corporation Names	Defendent (Petitioner here) Alabama Corporation Names
1890	Most Worshipful Union Grand Lodge of the Most Ancient and Honorable Fraternity of Ancient Free and Accepted Masons for the State of Georgia.	
1910	Same	
1917	Same	(Organized as association under name Free and Accepted Colored Masons of America.)
1921	Same	Incorporated as Free and Accepted Colored Masons of America.
1924	Same	(Year Defendent entered Georgia)—Same
1926	Same	Supreme Grand Lodge of Free and Accepted Colored Masons of America.
1930	Same	Same
1936	Most Worshipful Prince Hall Grand Lodge A.F. and A. M. of Georgia.	Same
1945	Same	Supreme Grand Lodge Modern Free and Accepted Colored Masons of the World.
1950	Most Worshipful Prince Hall Grand Lodge Free and Accepted Masons, Jurisdiction of Georgia	Same
At time of suit	Same	Same

and that there was no evidence of any kind that Petitioner represented itself to be Respondent, or associated with or a part of Respondent, or sponsored by or affiliated with Respondent, the District Court on December 28, 1951, enjoined Petitioner (a) from using or employing the ceremonies, emblems, etc. of Respondent, and (b) from using the words "Free and Accepted" in its corporate name or otherwise. (R. 1170-1185; Judgment, R. 1184-1185).

After the decision of the District Court was announced, Petitioner employed its present Counsel, W. Edward Swinson, to represent it and to appeal the decision.

Petitioner then filed a motion for new trial. (R. 1185-1188). In the order denying that Motion, the District Court, without Motion of Respondent or written request made for it, amended the original judgment or decree, and enjoined Petitioner from using the word "Masons" as a part of its corporate name or otherwise. (R. 1190-1191).

On appeal to the Fifth Circuit Court of Appeals, Petitioner, among other contentions, urged that the injunctive judgment was clearly erroneous, because:

(1) The Georgia statute (Appendix A hereof, page 19) had not been cited to or applied by the District Court.

(2) The words "Free and Accepted Masons" are not (while the words "Prince Hall" are) the distinctive feature of the name of Respondent, and that there was no evidence showing that the adoption of the words "Free and Accepted Masons" by Petitioner was done "with intention of deceiving and misleading the public."

(3) There was no evidence that Petitioner represented itself to be, or to be a part of, or affiliated with, or sponsored by, Respondent.

(4) The evidence affirmatively showed that the ceremonies, emblems, etc. used by Respondent were used by all other negro masonic organizations, including Petitioner, in Georgia, and the District Court, therefore, was not authorized to enjoin Petitioner from the use or practice thereof.

(5) The District Court was not authorized by law to enjoin Petitioner from the use of the word "Masons," as part of its Alabama corporate name, or otherwise.

(6) The fact that Petitioner had not received a charter or franchise from a recognized or superior masonic body was not sufficient to authorize the District Court to condemn Petitioner with illegality, and there was no evidence to support the findings of the District Court that Petitioner misrepresented in any way its origin.

(7) Respondent was estopped by laches.

The Fifth Circuit Court, through Circuit Judges Russell and Rives (Chief Judge Hutcheson dissenting), disregarding the contentions of Petitioner, and particularly the contention that Georgia law required proof of the intent to deceive and mislead the public "as a prerequisite to the granting of injunctive relief," affirmed the decision of the District Court. (See Opinion, R. 1226-1229).

In the dissent Chief Judge Hutcheson concurred on the point that there was sufficient evidence to support the injunction against the use of the words "Free and Accepted;" and he dissented strongly to the ruling of the majority that Petitioner is not " a legally existing masonic organization," and vigorously to the implied ruling of the majority that Respondent is entitled to use the word "Masons" while Petitioner is not. (R. 1229-1231).

In deciding the question of the sufficiency of the evidence to authorize the findings and judgment of the District Court, the Fifth Circuit Court overlooked or ignored the following: (a) the words "Free and Accepted" were appropriated to the corporate name and activities of Petitioner in 1921 when Petitioner was incorporated in Alabama long before there was competition between Respondent and Petitioner; (b) it is common knowledge that almost all masonic bodies, for white and for colored, use the words "Free and Accepted" in their names, and the evidence shows that to be true among the negro masonic organizations in Georgia; (c) the same emblems, ceremonies, etc., used by Respondent were used by all other negro masonic bodies in Georgia, including Petitioner; and the substantive Georgia law applicable to this cause, which was not applied to the evidence in this case by either the District Court or the Appellate Court, requires as a prerequisite to the grant of an injunction that the intent to deceive and mislead the public must be proven.

In failing to apply the Georgia law with regard to proof of intent, the Fifth Circuit Court ignored the applicable statutory law of Georgia, Georgia Code 1933, Sec. 37-712 (Appendix A hereof, page 19), and the Georgia decisions cited to that Court.

Georgia Code Sec. 37-712 was applied by the Supreme Court of Georgia in a decision rendered on November 18, 1881, as follows:

> ". . . To have a word or words claimed as a trade-mark protected by injunction from use by another, it should appear that the defendant's use of them was with intent to deceive or mislead the public." (Emphasis supplied).
>
> **Larrabee & Co. v. Lewis, 67 Ga. 561, 562 (2).**

There being no special statute of unfair competition in Georgia applicable generally to fraternal corporations or associations, the established equitable principles of unfair competition are applied to cases of unfair competition between such organizations.

Lane v. Evening Star, 120 Ga. 355 (1).
Creswill v. Knights of Pythias, 133 Ga. 837, rev. 255 U. S. 246, 56 L. ed. 1074.

Between the time that Larrabee & Co. v. Lewis, supra, was decided in the year 1881, and the time that the case of Atlanta Paper Co. v. Jacksonville Paper Co., 184 Ga. 205, was decided on March 25, 1937, the following unfair competition cases were decided by the Supreme Court of Georgia, without applying Georgia Code, 1933, Sec. 37-712; and it is believed that said Code Sec. 37-712 in that interim was overlooked.

Good Samaritans v. Mack, 139 Ga. 835;
Faison v. Adair, 144 Ga. 797;
Emory v. Odd Fellows, 140 Ga. 423;
Graves v. Grand Lodge, 155 Ga. 147;
Graves v. Grand Lodge, 161 Ga. 110;
Carter v. Carter Elec. Co., 186 Ga. 297;
Industrial Co. v. Mitchell, 164 Ga. 437;
Saunders v. Drive It Yourself, 158 Ga. 1.

The Supreme Court of Georgia in the cases cited immediately supra, made rulings in conflict with Georgia Code, 1933, Sec. 37-712, and the construction thereof appearing in Larrabee & Co. v. Lewis, supra. Those holdings were based upon authorities and precedents from states and jurisdictions other than Georgia. Among the rulings at variance with the Georgia law were holdings asserting that if "tendency" to deceive or "likelihood" of deceiving the public appears, an injunction may be granted.

On March 25, 1937, the Supreme Court of Georgia, in deciding the case of Atlanta Paper Co. v. Jacksonville Paper Co., 184 Ga. 205 opin. 213, returned to the construction of Georgia Code, 1933, Sec. 37-712 made by the Georgia Court in Larrabee v. Lewis, supra, and said, ". . . in this State our statute must govern."

Perhaps the State of Georgia is not abreast of the modern developments in the law of unfair competition. It may be that the better and more advanced rule is that if the evidence shows the "tendency" or "likelihood" that the public will be deceived or misled, an injunction may be granted; but the law of Georgia is otherwise. It requires proof of intent to deceive or mislead the public. The Supreme Court of Georgia has never varied the rule since the Atlanta Paper Co. decision, supra. See:

First Fed. Asso. v. First Finance Corp., 207 Ga. 695;

Kay Jewelry v. Kapiloff, 204 Ga. 209;

Gordy v. Dunwoody, 74 So. Rep. 2d 886.

Decisions of this Court required that the District Court and the Fifth Circuit Court apply the substantive Georgia law of unfair competition to this cause.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188;

Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 82 L. ed. 1290.

The ruling of the District Court affirmed by the Fifth Circuit Court enjoining Petitioner from using the word "Masons," without regard here to the circumstances under which it was rendered, amounts to a sort of judicial tyranny which dictates that Petitioner, an Alabama fraternal corpor-

ation for colored persons, shall not conduct a negro masonic organization within the State of Georgia. The proper object of the law of unfair competition is to correct evils in business and among fraternal organizations, not to destroy their beneficial functions.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court.

2. In holding that the evidence of unfair competition was sufficient to support the judgment of the District Court.

3. In failing to apply the Georgia law of unfair competition requiring proof of intent to deceive or mislead the public as a perequisite to the grant of an injunction, and in failing to hold that the evidence as measured by that rule was insufficient to sustain the judgment.

4. In holding in effect that a negro masonic body, organized without having first obtained a charter or franchise from a superior, recognized masonic body, is illegal in the sense that the District Court was authorized by law to find against Petitioner because it was organized without such charter.

5. In ruling against Petitioner because it had not first obtained a charter from a superior, recognized masonic body, when the evidence fails to show that Respondent was organized after first having obtained such a charter.

6. In failing to hold that the evidence, under Georgia law, was insufficient to sustain the injunctive judgment of the District Court in regard to emblems, ceremonies, etc.

7. In holding that the District Court, without motion or request therefor, was authorized by law to amend its original injunctive judgment in the order entered on the motion for new trial of Petitioner, enjoining Petitioner from the use of the word "Masons" as a part of its corporate name or otherwise.

8. In holding that the evidence, under Georgia law, was sufficient to sustain the injunctive judgment of the District Court enjoining Petitioner from the use of the word "Masons."

9. In holding that Petitioner was not entitled under Georgia law to conduct a negro masonic body within the State of Georgia.

Simply to aid in the study of the record for the purpose of determining the validity of the contention of Petitioner that the foregoing errors were made, Petitioner supplies the following:

10. The Complaint (R. 2-9, Amendment R. 10-12) was framed so as to be brought under Georgia Code, 1933, Sections 106-201-2 (Appendix A hereof, pages 19-23) and also under the general Georgia law of unfair competition. The Attorney who represented Petitioner in the District Court never seemed to realize that Respondent was prosecuting the action on the two theories, and said Attorney never did cite to the District Court Georgia Code, 1933, Sec. 37-712 or the decisions of the Supreme Court of Georgia construing the same cited later to the Fifth Circuit Court and herein cited. The District Court ruled favorably to Petitioner on said Sections 106-201-2, and unfavorably to Petitioner under the general Georgia law of unfair competition. Code Sections 106-201-2 are set forth in Appendix A hereof only to point out that the intent of Georgia law seems to be

to discourage injunctions against fraternal organizations, and, in a measure, to protect them in the use of their names.

11. This is not a case of a schismatic group leaving a parent organization and organizing a similar fraternal body (R. 1177), charged with the intent of appropriating the name and good will of the parent. That distinction in itself requires the application of a stricter rule to the evidence.

12. There is no evidence that the adoption or use of the words "Free and Accepted Masons" was made for the purpose of deceiving or misleading the public. It will be seen from the history of the corporate names set forth at page 3 hereof that the changes made by Petitioner since 1944 serve to distinguish more clearly the two names while the changes made by Respondent make the names more similar.

13. There was evidence, improperly admitted in the opinion of Counsel for Petitioner, which indicated that the business of Petitioner was inefficiently conducted to the point that fraud upon members might be practiced, but no witness appeared complaining of abuses or breach of contractual relations by Petitioner.

14. Attempts were made by Respondent to prove misrepresentation by name (R. 215-227; 397-403; 227-231; 416-418; 231-235; 302-303; 403-408; 409-416; 432-440; 284-285; 714; 370-382; 416-422; 441-452; 452-456; and 856-868); but in each instance the evidence was either too weak in weight to be relied upon or it affirmatively appeared that Petitioner was clearly identified from Respondent.

15. There was one instance where Respondent claimed that Petitioner tried to take a local lodge, its lodge hall and members (R. 301), but the testimony showed that Re-

spondent had abandoned the same and no misrepresentations were made. (R. 238-241; 338-358; 358-369).

16. Respondent attempted to prove confusion in mail and confusion produced by the use of the stationery of Petitioner (R. 468-474; 980-982), but the testimony did not amount to competent evidence.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit Court failed to apply the Georgia law requiring that, as a prerequisite to the grant of the injunction, proof of the intent to deceive or mislead the public must have been made. In effect, that was a failure to apply the decisions of this Court in Erie Railroad Co. v. Tompkins, supra, and Ruhlin v. N. Y. Life Ins. Co., supra. Counsel for Petitioner is familiar with the principle that federal courts are not bound completely by the rules of evidence in force and effect in the state courts, but this Georgia rule is not simply a rule of evidence. It is substantive, and is a statutory condition precedent to the grant of an injunction in unfair competition suits.

There are times when an appellate court is somewhat doubtful of its decision and the doubt appears from its written opinion as a sort of self-consciousness which cannot be concealed. Petitioner believes this to be such a decision by the Fifth Circuit Court. Else, why would the opinion have stated: "The finding of the trial court that appellant's (Petitioner's) adoption of the infringing words as a part of its name was done with intent to deceive and defraud the public is well supported by the evidence, and therefore we do not deem it necessary to consider appellant's contention that such intent must be proved as a prerequisite to the granting of injunctive relief?"

While uniformity of decision may be desirable in the federal courts, the rationale of the Erie and Ruhlin decisions, supra, is to create lack of uniformity in federal decisions where state laws are different. And in actions involving state laws, it is highly important, under the decisions of this Court, that state laws be given effect. It is important to the citizens of each state for it tends to promote uniformity of decision between the state courts and federal courts of each state where the law of the state is involved.

2. The charge is respectfully but not lightly made that there is no competent evidence in the record to justify the judgments of the District and Fifth Circuit Courts. Counsel for Petitioner is somewhat of the opinion that this statement is true even if the Georgia law be not applied. And Counsel for Petitioner sincerely believes that, if the Georgia law is applied, the charge is correct.

If it should be that the judgment of the District Court was clearly erroneous, because without competent evidence to support it, then the Fifth Circuit Court has sanctioned a departure from law and due process which should authorize the exercise of the supervisory powers of this Court. It becomes then, not so much a matter of correcting errors assumed in the risk of litigation, as a matter of injustice, rectifiable only by, and despite of the other important business of, this Court.

3. In arriving at the decision that there was sufficient evidence to support the judgment, the District Court found (R. 1181-1182) and the Fifth Circuit Court sanctioned the finding by affirmance (R. 1228), that Petitioner was not "a legally existing masonic organization according to Masonic history and jurisprudence," because Petitioner at the time of its corporate organization or since did not possess "a

warrant or charter from any recognized masonic body." That finding and holding was made despite the fact that there was no proof that Respondent possessed such a "warrant" or "charter" at the time of its organization or at the time this suit was instituted by it.

If that finding or holding is an essential finding to the judgments of the District and Fifth Circuit Courts, then Petitioner sincerely believes it to be error, and serious error.

It is important that this error be not permitted to stand to confuse the future application of the law of unfair competition. Chief Judge Hutcheson, cognizant of the illegality of the concept, criticised the judgment of the Fifth Circuit in that respect in his dissent. (R. 1229-1231).

4. In affirming the injunction of the District Court against the use of the word "Masons," the Fifth Circuit Court sanctioned the act of the District Court in amending its injunctive order, without motion or written request therefor, in the order denying the motion for new trial filed by Petitioner. As Chief Judge Hutcheson points out in the dissenting opinion (R. 1229 et. seq.), that was done by the District Judge without any reason of record to support it. Not only did the Fifth Circuit Court sanction that irregular practice, but sanctioned what is in effect a court order denying to Petitioner the right to conduct a negro masonic body in the State of Georgia. Certainly, there is nothing in the law, or in the evidence in this cause, to justify the imposition of such a penalty. If Petitioner is guilty of conduct amounting to unfair competition with regard to the words "Free and Accepted" and any of its other acts, there is nothing in this record to show that an injunctive order against all such conduct would not adequately and prospectively protect Respondent. The judgment, as it stands,

denies to a small but growing masonic organization, Petitioner, its rightful chance "to be accepted in the market place" in Georgia.

5. If the findings and judgment of the District Court are read without an analysis of the evidence, the impression is received that the District Judge was morally justified in attempting to discover a path authorized by law to grant an injunction. When the evidence is carefully read, the impression is obtained that certain facts had become greatly exaggerated in the mind of the District Judge, causing him to conclude that, because of irregularities in the management of Petitioner which might tempt fraud to be committed upon members of Petitioner by the officers of Petitioner, the Supreme Grand Master of Petitioner prior to the suit had already committed such frauds. Counsel for Petitioner is of opinion that all such evidence is immaterial and should not have been received. But despite the irrelevancy of the evidence introduced, an examination of the record will fail to disclose even one complaint or charge that a single member of Petitioner was injured by Petitioner, or any act of its Supreme Grand Master, or ever lost one cent Petitioner contractually agreed to pay.

As an illustration that some of the evidence was exaggerated in the mind of the District Judge, Counsel for Petitioner desires to state one instance. The District Court made a finding that, in effect, Petitioner regularly and customarily gave to its new members the first three masonic degrees in one night. (R. 1181-1182). The evidence to support that finding is not only weak and unsatisfactory, but that evidence coming from the witnesses of Respondent is not competent, because it shows that a dishonest local lodge official, without proof of knowledge by or authority from Petitioner, did give the three degrees to one person in one night as a part of a scheme to embezzle money from

Petitioner. (R. 447 et seq.). It is true that the Supreme Grand Master of Petitioner testified he had heard of several local lodges which had given the three degrees in one night, but he insisted that was not authorized by Petitioner or customarily practiced. (R. 753-754). With only the stated basis for the finding, it is clear that the finding was prejudicial to Petitioner and based upon a misinterpretation of the weight of the evidence.

6. This is not the first case between fraternal organizations involving the Georgia law of unfair competition which has reached this Court. See Creswill v. Grand Lodge Knights of Pythias of Georgia, 225 U. S. 246, 56 L. ed. 1074. The Creswill decision, supra, reversed the Supreme Court of Georgia by sustaining a plea of laches, but in addition this Court strongly indicated a reversal might have been made upon insufficient evidence to support the decree. A reading of the Creswill opinion of the Supreme Court of Georgia (133 Ga. 837) and the opinion of this Court in that case, supra, will show that the evidence in this case suffers from the same defects which existed in the evidence in the Creswill case. It is against the public interest for the law to be strained to do a good, because the future suffers. But the evil is worse when a case is decided against a litigant on insufficient evidence, for then public confidence in the integrity and judgment of our courts is damaged and the error never ceases to harm our people.

7. The evidence showed that Petitioner had conducted a negro masonic order in Georgia since 1924 (R. 1178), and that at the time of the hearing in the District Court Petitioner was maintaining a substantial number of local lodges scattered over Georgia, with a Georgia membership of approximately 2,200 members (R. 1180); that Petitioner also had state organizations and local lodges, affiliated with Petitioner, in between fourteen and sixteen states other

than Georgia, with membership of approximately 10,000 (R. 1180); and that in Georgia there were three principal negro Masonic bodies; Respondent, the largest, the York Masons, the second in size, and in the York name are the words, "Free and Accepted Masons" (R. 480); and Petitioner, the smaller. The evidence, too, shows that Petitioner, in comparison with Respondent, is much the smaller financially.

The judgment of the Fifth Circuit Court, despite the fact that it may not affect the rights of members contained in the burial certificates (R. 1229), does affect and restrain the rights or desires of the 2,200 Georgia members of Petitioner. They, too, by its force are enjoined; they are denied the right to remain members, and still others are denied the privilege of becoming members, of a negro masonic body which they prefer over other such bodies available to them. It is not of record, but Counsel for Petitioner believes it not improper to state that not a single member of Petitioner has been lost because of this litigation, but that on the other hand membership in Petitioner has increased since the suit was instituted.

The 10,000 members of Petitioner in states other than Georgia may also be affected. Petitioner is the parent organization of the state and local lodges in the fourteen to sixteen states other than Georgia in which Petitioner operates. It may be contended later, if the judgment stands, that Petitioner cannot use the words "Free and Accepted" or the word "Masons" in its corporate name in Georgia, even though Petitioner confines its operations to acting as the parent of the state and local lodges in all the states except Georgia, and in Georgia it abandons all other activity. In any event, the 10,000 non-resident members are interested and may be affected.

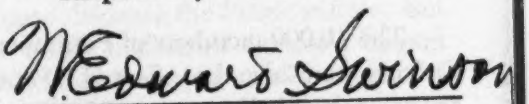
But one of the factors of great importance to the public interest is that the members of Petitioner believe, as does Counsel for Petitioner, that an injustice though not wilfully has been done by the District and Fifth Circuit Courts, and that, while this case involves only the less-privileged in the country, it is of sufficient importance to appeal to this Court to devote some of its valuable time to review the proceedings and correct any substantial injustice committed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

This 10th day of March, 1954.

Respectfully submitted,



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APPENDIX A

Item 1. Any attempt to encroach upon the business of a trader, or other person, by the use of similar trademarks, names or devices, with intention of deceiving and misleading the public, is a fraud for which equity will grant relief.

Georgia Code Anno., 1933, Sec. 37-712.

Item 2. From the following Georgia statute:

BENEVOLENT ORGANIZATIONS, PROTECTION OF NAMES AND EMBLEMS
No. 276

An act to preserve to benevolent, fraternal, social, humane or charitable organization, which are not organized for individual pecuniary gain, the right to the exclusive use of the names adopted and used by them, whether incorporated or not; to protect such organizations in the use of their names and emblems, and prevent the infringement and unauthorized use thereof, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same, that from and after the passage of this Act, no person or organization shall assume, use or adopt, or become incorporated under, or continue to use the name and style or emblems of any benevolent, fraternal, social, humane, or charitable organization previously existing in this State, and which has been incorporated under the laws of this

or any other State, or of the United States, or a name and style or emblems so nearly resembling the name and styles of such incorporated organization as to be a colorable imitation thereof. In all cases where two or more of such societies, associations or corporations claim the right to the same name, or to names substantially similar as above provided, the organization which was first organized and used the name, and first became incorporated under the laws of the United States, or of any State of the Union, whether incorporated in this State or not, shall be entitled in this State to the prior and exclusive use of such name and the rights of such societies, association or corporations, and of their individual members shall be fixed and determined accordingly.

Section 2. Be it further enacted, That whenever there shall be an actual or threatened violation of the provisions of Section 1 of this Act, the organization entitled to the exclusive use of the name in question, under the terms of said Section, shall have the right to apply to the proper courts for an injunction to restrain the infringement of its name and the use of its emblems, and if it shall be made to appear to the court that the defendants are in fact infringing or about to infringe the name and style of a previously existing benevolent, fraternal, social, humane, or charitable organization in the manner prohibited in said Section 1 of this Act, or that the defendant or defendants are wearing or using the badge, insignia or emblems of said organization, without the authority thereof and in violation of said Section 1, an injunction be issued by

the court under the principles of equity without requiring proof that any person has been in fact misled or deceived by the infringement of such name, or the use of such emblem.

Section 3. Be it further enacted, That any person who shall wear a badge, button, or other emblems, or shall use the name or claim to be a member of any benevolent, fraternal, social, humane or charitable organization which is entitled to the exclusive use of such name and emblems under Section 1 of this Act, either in the identical form or in such near resemblance thereto as to be a colorable imitation of such emblems and name, unless entitled to do so under the laws, rules and regulations of such organization, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as prescribed in Section 1039 in the Penal Code of Georgia.

Section 4. Be it further enacted, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

Approved August 17, 1909.

the following sections of the Georgia Code were codified:

Item 8. 106-201. Imitation of name, style, or emblem; priority of right.—No person or organization shall assume, use, or adopt, or become incorporated under, or continue to use the name and style or emblems of any benevolent, fraternal, social, humane, or charitable organization pre-

viously existing in this State, and which has been incorporated under the laws of this or any other State, or of the United States, or a name and style or emblem so nearly resembling the name and style of such incorporated organization as to be a colorable imitation thereof. In all cases where two or more of such societies, associations, or corporations claim the right to the same name, or to names substantially similar as above provided, the organization which was first organized and used the name, and first became incorporated under the laws of the United States or of any State of the Union, whether incorporated in this State or not, shall be entitled in this State to the prior and exclusive use of such name, and the rights of such societies, associations, or corporations, and of their individual members shall be fixed and determined accordingly. (Acts 1909, p. 139.)

106.202. Injunction against infringement.—Whenever there shall be an actual or threatened violation of the provisions of the preceding section, the organization entitled to the exclusive use of the name in question, under the terms of said section, shall have the right to apply to the proper court for an injunction to restrain the infringement of its name and the use of its emblems; and if it shall be made to appear to the court that the defendants are in fact infringing or about to infringe the name and style of a previously existing benevolent, fraternal, social, humane, or charitable organization in the manner prohibited in said section, or that the defendant or the defendants are wearing or using the badge,

insignia, or emblems of said organization, without the authority thereof and in violation of said section, an injunction may be issued by the court under the principles of equity without requiring proof that any person has been in fact misled or deceived by the infringement of such name, or the use of such emblem. (Acts 1909, pp. 139, 140.)

Ga. Code Anno., 1933, Secs. 106-201-2.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 636

SUPREME GRAND LODGE, MODERN FREE AND ACCEPTED COLORED MASONS OF THE WORLD,

Petitioner,

v.

MOST WORSHIPFUL PRINCE HALL GRAND LODGE, FREE AND ACCEPTED MASONS, JURISDICTION OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court (R. 1170-1185) is reported at 105 F. Supp. 315. The opinion of the Court of Appeals for the Fifth Circuit and the dissenting opinion (R. 1226-1231) are reported at 209 F. 2d 156.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

No question is presented in the petition.

Statement

Respondent, a Georgia corporation, instituted this action on February 13, 1951, in the United States District Court for the Middle District of Georgia against petitioner, an Alabama corporation doing business in the State of Georgia. Federal jurisdiction is based upon diversity of citizenship and the requisite jurisdictional amount. The complaint alleged that petitioner was engaged in unfair competition with respondent (R. 2-11).

History of Petitioner and Respondent

Respondent's evidence demonstrated that on March 6, 1775, Prince Hall, a free Negro, and fourteen other free Negroes were initiated into the Masonic fraternity by British Army Lodge No. 441 (R. 53, 249). A year later, just prior to the evacuation of Boston by the British, this Army Lodge gave to Prince Hall and his group of followers a license or permit to meet as a lodge of Masons in accordance with the Masonic practice and custom of the day (R. 53-54). Under that license African Lodge No. 1 was organized in 1776 in the City of Boston with Prince Hall as its first master (R. 54). The intent of the Army Lodge was apparently that this permit should serve as temporary authority until a more formal warrant could be secured from the Grand Lodge of England (R. 56). After the Revolutionary War, Prince Hall requested the Grand Lodge of England to issue a warrant for this lodge. On September 29, 1784, the Grand Lodge of England warranted this group as African Lodge No. 459 under the authority of the Grand Master of England (R. 57, 1075). Prince Hall was named the master of this lodge (R. 58).

In 1791 Prince Hall called an assembly of all the Negroes in the craft and, in accordance with Masonic law and authority of that time, the African Grand Lodge was formed. This method of forming a new grand lodge is known in Masonic language as an "assembly of the craft" (R. 58, 1024). The African Grand Lodge then proceeded to warrant local lodges under its authority (R. 58-59). Soon after Prince Hall died in 1807, a delegate convention consisting of representatives of three lodges met in Boston and changed the name of African Grand Lodge to Prince Hall Grand Lodge (R. 61).

Respondent traces its origin directly to Prince Hall and African Lodge No. 459. Three lodges of Negro Masons were established in the State of Georgia immediately following the Civil War. Two of these lodges had been chartered by the Prince Hall Grand Lodge of Massachusetts and the other by the Prince Hall Grand Lodge of Pennsylvania (R. 165). These three lodges met in convention in 1870 and, in accordance with Masonic jurisprudence, respondent was formed under the name "Most Worshipful Grand Lodge of Free and Accepted Masons of the State of Georgia" (R. 62, 165-167).

Respondent has had a continuous existence in the State of Georgia since 1870 (R. 166-167, 177). Respondent was incorporated in the State of Georgia in 1890, receiving a charter from the Superior Court of Chatham County under the name "Most Worshipful Union Grand Lodge of the Most Ancient and Honorable Fraternity of Ancient Free and Accepted Masons for the State of Georgia" (R. 166-167). In 1936 this charter was renewed and amended by proper order of the court and respondent's name was changed to "Most Worshipful Prince Hall Grand Lodge A. F. and A. M. of Georgia". The letters "A. F. and A. M." are generally understood to mean Ancient Free and Accepted Masons (R. 169). The charter was again prop-

erly amended in 1950 and the name changed slightly to its present form: "Most Worshipful Prince Hall Grand Lodge, Free and Accepted Masons, Jurisdiction of Georgia" (R. 167).

Considerable expert evidence was introduced which demonstrated that respondent is a regular and legitimate body of Masons, organized in conformance with Masonic law practice and tracing its origin to Prince Hall, the first Negro Mason in America (R. 53-62).

Petitioner was first organized about the year 1917 at or near Opelika, Alabama, when a group of about six to eight persons, said to be Master Masons, met and organized (R. 617, 1177). In 1921, petitioner was incorporated in the State of Alabama, receiving a charter from a court of competent jurisdiction for the County of Jefferson under the name "Free and Accepted Colored Masons of America" (R. 642-643, 1177). In 1924 delegates from a few subordinate lodges in Alabama and Georgia formed a Supreme Grand Lodge and J. B. Baldwin was elected Supreme Grand Master (R. 615-616, 1178). In 1945, by amendment to its charter, the name of petitioner was changed to "Supreme Grand Lodge, Modern Free and Accepted Colored Masons of the World" (R. 649).

Petitioner made no attempt to prove that it had received any warrant or authority from any duly constituted Masonic group. In fact, the Grand Master of petitioner admitted lack of any such authority (R. 743). Rather, petitioner sought to cast a cloud upon respondent's legitimacy.

An expert witness offered by petitioner testified that certain grand lodges of Negro Masons participated in or acquiesced in the formation of a National Compact about the year 1847 (R. 490-494). This Compact formed by representatives of those grand lodges as a national supreme body asserted supremacy over the state grand lodges. It

is admitted by all experts testifying that such a compact was formed (R. 490-494, 848). Respondent's expert witness testified that said National Compact was found to be contrary to Masonic law and practice and was formally dissolved in 1877 (R. 247-248, 279, 256). Petitioner's expert, on the other hand, claimed that said National Compact was legitimate and persisted after 1877 (R. 494-495, 590-591). This expert also claimed that respondent can trace its origin only to certain rebellious lodges which were expelled from the National Compact about 1877 and that respondent is therefore not a regular Masonic body (R. 811). These claims, however, are refuted by respondent's expert witness, Masonic treatises and historical materials which demonstrate that respondent is the regular and legitimate body of Negro Masons organized in conformance with Masonic law (R. 247-248, 279, 587-592).

There was also evidence that the activities of petitioner were not conducted in accordance with Masonic law and tradition (R. 84, 683-689, 721-731, 743-744, 747-750, 795-831). The fraternal aspects of petitioner were subordinated to the business of providing insurance and burial aid, activities highly remunerative to petitioner's officers. The evidence also showed that petitioner is a one-man enterprise, controlled by J. B. Baldwin, its Supreme Grand Master, who has utilized the organization to enhance his undertaking and casket business (R. 655, 659-665, 674, 683-689, 710, 721-731, 747-748, 757, 795-806, 828-831).

The Unfair Competition

Both petitioner and respondent use as the distinctive part of their names (R. 285) the words "Free and Accepted" and the word "Masons". Further, respondent's evidence, not denied by petitioner, indicates that both parties use the same signs, grips, password, emblems, badges etc. (R. 340, 362, 378). There is abundant evidence to the

effect that officers and agents of petitioner actively solicited new member who were invariably told that petitioner was an order of "Free and Accepted Masons", that all Masonic lodges were the same, except that petitioner did more for its members, and that petitioner was world-wide (R. 339, 359, 384-385, 405, 419, 422, 422-443). Petitioner's officers, in addition, assured prospective members that petitioner used the same grips, signs, etc. used by every other Masonic lodge (R. 419, 711-712, 751). In fact, one of petitioner's subordinate lodges actually uses the term "Prince Hall" as a part of its name (R. 715).

There is also considerable evidence that the similarity in name and ritual resulted in injury to respondent and confusion to the public. Several witnesses testified that they thought that petitioner and respondent were one and the same body (R. 371-375, 385-386, 401-402, 418-419, 419-422, 446). A number of persons were thereby misled into joining petitioner. There was like testimony indicating that the similarity in names resulted in confusion in the receipt of mail (R. 469, 980-982). Furthermore, there was evidence that petitioner had even usurped respondent's physical premises. For example, one of petitioner's subordinate lodges assumed control over the furniture and Masonic tools belonging to respondent, and members of petitioner's lodge drove respondent's members out of their own meeting place (R. 355-357).

Findings and Judgment of the District Court

After a trial without a jury, the District Court found as a fact that respondent and its legitimate predecessors have had a favorable and continuous existence in America since about 1776, and a continuous existence in the State of Georgia since a date immediately following the end of the Civil War (R. 1175). The trial court further found that petitioner came into existence in the State of Alabama in 1917 and that according to Masonic jurisprudence peti-

tioner is not regularly and lawfully organized (R. 1177, 1181). The court described petitioner as "almost if not completely dominated and controlled by J. B. Baldwin, its Supreme Grand Master of its Supreme Grand Lodge", and concluded that the interest of petitioner was largely in insurance and burial aid which it furnishes its members at considerable profit to its officers (R. 1179-1180). On the basis of its history, the fact that it is largely a one-man institution and the fact that the insurance and burial aspects predominated, the District Court concluded that petitioner is not an authenic Masonic organization, but is spurious and illegitimate (R. 1181-1182). Finally, the court concluded that the adoption by petitioner of the words "Free and Accepted", which are the distinctive features of respondent, was done by petitioner with the intent to deceive and defraud the public and reap the benefit of respondent's good will to the injury of respondent and to the confusion of the public (R. 1181). Accordingly, on January 2, 1952, judgment was entered enjoining petitioner from using the words "Free and Accepted" and from using the ritual and ceremonies of respondent (R. 1184-1185). Subsequently, the District Court denied petitioner's motion for a new trial and at the same time amended its judgment so as to restrain petitioner from using the words "Free and Accepted Masons" or "Masons" (R. 1190-1191). The Court of Appeals for the Fifth Circuit affirmed on January 6, 1954, Chief Judge Hutcheson concurring in part and dissenting in part (R. 1226-1232).

ARGUMENT

I. The petition fails to comply with Rule 38 (2) of this Court.

The petition fails to state any question conforming with the requirement of Rule 38 (2) of this Court. The petition should accordingly be denied. See *United States* v. *Rimer*, 220 U. S. 547, and other cases cited in Rule 38(2).

II. The petition neither presents a federal question nor does it raise any important question of local law decided in a way probably in conflict with applicable local decisions.

This is an unfair competition action in which federal jurisdiction is based solely on diversity of jurisdiction. No federal question is presented [1] nor does this case involve any conflict between decisions of Courts of Appeal. No important question of local law is involved. Furthermore, the questions of local law decided below are clearly in accord with Georgia decisions.

There is no merit in petitioner's assertion that the decision of the Court of Appeals is in conflict with the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. Petitioner has indeed strained very hard to find a federal question in this record. Respondent agrees that the Georgia law of unfair competition is applicable and that under that law it is necessary to prove an intent to deceive or mislead the public. *Atlanta Paper Co.* v. *Jacksonville Paper Co.*, 184 Ga. 205, 190 S. E. 777 (1937). But it is clear that both the District Court and the Court of Appeals properly

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[1] Unlike *Ancient Egyptian Arabic Order N. M. S.* v. *Michaux*, 279 U. S. 737, and *Creswill* v. *Grand Lodge, Knights of Pythias of Georgia*, 225 U. S. 246, petitioner here is not incorporated pursuant to Act of Congress.

applied Georgia law. In its finding of fact No. 31, the trial court found as follows:

> "31. I find that the adoption by the defendant of the words 'Free and Accepted', which are the distinctive features of the plaintiff, was done by the defendant with the intent to deceive and defraud the public and reap the benefit of plaintiff's good will, to the injury and damage of the plaintiff, and to the confusion of the public" (R. 1181).

In affirming, the Court of Appeals declared:

> "The finding of the trial court that appellant's adoption of the infringing words as a part of its name was done with intent to deceive and defraud the public is well supported by the evidence * * *" (R. 1228).

Thus, the real thrust of petitioner's argument is not that the court below violated the rule of *Erie Railroad Co.* v. *Tompkins* by refusing to apply state law, but merely that the court below applied Georgia law badly in the sense that the finding that petitioner intended to mislead is not supported by the evidence. Thus rephrased, petitioner's contention raises no federal question at all, unless every challenge to the sufficiency of the evidence in support of the application of proper state law in diversity cases can be denominated a federal question.

Petitioner's reliance upon the decision in *Atlanta Paper Co.* v. *Jacksonville Paper Co., supra,* as repudiating prior Georgia decisions and changing the Georgia unfair competition law is plainly misplaced. In fact, the Georgia Supreme Court in *Atlanta Paper* cites with approval most of the cases which petitioner states were overruled. 184 Ga. at 211, 190 S. E. at 782. The opinion in the *Atlanta Paper* case sums up the applicable Georgia law in these

words at pages 212-213 and 782-783 of the official and regional reports, respectively:

> "It [unfair competition] consists in passing off, or attempting to pass off, on the public, the goods or business of one person as and for the goods and business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to that effect. *In fact, it may be stated broadly that any conduct, the nature and probably tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for the goods and* business of another, constitutes actionable unfair competition." (Emphasis added.)

Thus, while Georgia law requires proof of an intent to deceive, this can be proved by circumstantial evidence. Conduct, the natural and probable tendency of which is to deceive the public, is strong circumstantial evidence tending to prove the requisite intent.

There is in fact abundant evidence in the record in support of the District Court's finding that petitioner intended to deceive and mislead the public. Under the rule of *Creswill* v. *Grand Lodge Knights of Pythias of Georgia*, 133 Ga. 837, 67 S. E. 188 (1910), rev. ot. gnds., 225 U. S. 246, the mere appropriation and use by petitioner of respondent's name where respondent has a clear right to its use is presumed fraudulent and alone can supply the necessary intent. But the evidence here is much more damaging. The evidence (as already set forth in the statement of the case) shows repeated attempts on the part of petitioner's officer to solicit members by representing that petitioner, like respondent, was a body of "Free and Accepted Masons" and that it used the same ritual as respondent and other authentic Masonic groups. There is likewise abundant evidence of resulting confusion. On all

the evidence, the conclusion is inescapable that petitioner, a group not formed in accordance with Masonic law and practice, appropriated the distinctive words which identify all legitimate Masonic orders, and conducted its activities with a clear intent to deceive and mislead the public.

The other points raised in the petition likewise present a challenge to the sufficiency of the evidence. For reasons already indicated, they do not raise any question meriting the grant of certiorari. Moreover, respondent submits that the evidence, as summarized earlier, clearly supports the findings of fact, conclusions of law and the full sweep of the injunctive relief granted by the courts below.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
AMOS T. HALL,
Counsel for Respondent.

April 15th, 1954.